BRIEF IN SUPPORT OF PETITION.

The Opinions Below.

The majority and minority opinions of the Circuit Court of Appeals for the Fourth Circuit (R. 323-46) were rendered on January 3, 1945, but have not yet been officially reported. The opinion of the Board (R. 64-99) rendered August 9, 1944, has not yet been officially reported.

Statute Involved.

The statute involved is the National Labor Relations Act, 49 Stat., 449. The Board's order related to alleged violations of Section 8 (1) and (2) of the Act, which read as follows:

> "SEC. 8. It shall be an unfair labor practice for an employer——
>
> "(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.
>
> "(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay."

Section 7, referred to in Section 8(1) above, reads as follows:

> "SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Specification of Errors.

The Circuit Court of Appeals, in sustaining the order of the Board, erred in each and all of the respects referred to in the point headings below.

I. It was error for the Circuit Court of Appeals to sustain the order of the Board on grounds not relied on by the Board, including facts not even found by the Board to have occurred.

The majority of the Circuit Court of Appeals in their opinion support the conclusion of the Board on the basis, among others, of five matters not relied on by the Board or mentioned by the Board in its decision, at the same time stating the principle: "* * * we may not substitute our own conclusions for those of the Board." (R. 325)

1. The majority of the Court list in summary fashion, near the end of their opinion (R. 331), matters which they stress as supporting the Board's conclusion. Upon the crucial question of the sufficiency of the knowledge received by the employees of the Company's announcement of termination of the employee representation plan and the Company's neutrality, the majority of the Circuit Court of Appeals state, as No. 2 of their summary list (R., 331): "(2) An equivocal second-hand announcement as to the dissolution of the Plan;". As support for the Court's statement that the Company's announcement of the dissolution of the plan was equivocal and improper, the Court relies heavily upon the asserted fact (R. 326) that Schmidt, one of the employee representatives, made a misleading statement to employee Mileski as to the significance of the Company's announcement. But the Board made no such finding. In fact, there is not a word in the Board's decision which directly or indirectly refers to any such occurrence. The reason why the Board made no such finding is obvious, for there is no testimony in the record to that effect. The

only reference made by Mileski in his testimony to a conversation with Schmidt was fixed by Mileski as occurring in August, 1933, four years before the formation of the Union, and had to do, not with the Union, but with the employee representation plan which was then being formed (R. 154).

2. On a similar critical issue in the case, namely the understanding of the employees as to the Company's position, the majority of the Court list, as No. 5 of their summary list (R. 331): "(5) An obvious belief by the employees that the Company desired an independent, rather than an outside, union;". No such statement is made by the Board anywhere in its decision and there is no evidence in the record to that effect. On the contrary, the uncontradicted evidence is that no employee voted for the Union because he thought the Company wanted him to (Typewritten testimony, p. 147). We are at a loss to know from what source the majority of the Court drew this inference on this vital matter.

3. Another important matter listed in the summary of the majority of the Court is: "(6) Swift grant to the Association by the Company of a check-off of dues, wage increases and other favors;" (R. 331). The question whether there was any significance in the so-called "check-off of dues" (actually a voluntary and revocable dues deduction, and so designated by the Board [R. 83]) and wage increases under the circumstances in this case (where there was no other labor organization making any contest, or, in fact, any organizational effort [R. 86]) was briefed before the Board. The I. A. M., the charging union, argued that the matter had significance. The Company argued that it did not. The Board in its decision merely mentions the dues deduction and wage increase in its statement of history, but they are not relied on by the Board as significant matters, for they are not among the matters set forth in the conclusory part of the decision of the Board as showing domina-

tion of the Union (R. 90-95). As Judge Soper says in his dissent (R. 340), these matters "are not mentioned in the Board's argument as having this significance."

4. In addition to the three matters included in their numerical summary and above discussed, the majority of the Court, in supporting the conclusion of the Board, also lay stress (R. 330) on an alleged incident in 1939, involving Leichsenring, a supervisory employee. Indeed, this incident is further relied on by the majority as a basis for the seventh matter in their summary list, *i. e.*, "(7) Expressions of opinions hostile to outside unions made by supervisory officials to employees." (R. 331) The Board in its decision (R. 85-90) detailed the incidents which it deemed significant. Nowhere in this section of the report, or anywhere else, did the Board mention the alleged Leichsenring incident.

5. Again, the majority of the Court, in supporting the conclusion of the Board, lay stress (R. 330) on alleged incidents involving Mercer, a supervisor. As in the case of the matter just previously discussed, the Board, neither in the section of its decision dealing with incidents deemed by it to be significant (R. 85-90) nor elsewhere in its decision, mentioned Mercer.

The Board apparently agreed with the Trial Examiner that the Leichsenring and Mercer incidents either did not occur or had no significance. Surely the majority of the Circuit Court of Appeals cannot properly support the conclusion of the Board by requiring the Board to credit testimony which it has rejected.

Labor Board v. *Virginia Electric & Power Co.*, 314 U. S. 469, 478-80 (1941), *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80, 95 (1943), *Florida* v. *United States*, 282 U. S. 194, 214-5 (1931), *Texas and Pacific Railway Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 237-9 (1896), and other decisions of this Court, establish that it is the function of administrative agencies to draw

conclusions and to state the grounds on which they rely in reaching their ultimate decision and that it is not for the courts to perform either the function of making findings of fact from a record on which the agency itself has not found such facts, or of drawing inferences from facts where the agency has not drawn such inferences. As this Court said in the *Chenery Corporation* case, *supra* [318 U. S., at p. 88]:

> "For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency."

It was, therefore, improper for the Circuit Court of Appeals in this case to attempt to support the decision of the Board on the basis of five findings relating to critical issues made by the Court, but not made or relied on by the Board. These five matters are not incidental trivia in the opinion of the majority of the Court, but are matters which they considered vital to the validity of the Board's order.

This feature of the case is illustrative of an intolerable situation which would confront litigants in proceedings before administrative agencies if this sort of procedure were to be upheld. The Trial Examiner found that there was "no substantial credible evidence" of any of the alleged incidents. The charging union, the I. A. M., took no exceptions but moved to have the Examiner's report confirmed as a whole by the Board (R. 68). Consequently, none of the incidents was briefed or argued before the Board. Nevertheless, the Board reinjected some incidents into the case, but not the incidents involving Leichsenring or Mercer, to which the majority of the Circuit Court of Appeals advert. While we argued before the Circuit Court of Appeals as to the few incidents which the Board did mention in its report, we naturally did not argue or brief the incidents relating to Leichsenring or Mercer. How can a litigant protect his rights if at each stage of a proceeding he meets the issues presented to him, but is confronted in the decision of the

tribunal with other matters which he has had no opportunity or occasion to meet before that tribunal? This matter is one of great importance in the administration of the Act and in federal administrative law generally, which this Court should resolve.

II. The order of the Board disestablishing the Union should not have been sustained since there is no evidence of actual domination and the Board failed to review and appraise substantial undisputed evidence that the Union is actually not dominated but is aggressive and militant, including a report of a panel of the War Labor Board to that effect.

Upon the face of the Act the ultimate question involved in any case in which the Board charges domination of a labor organization and orders disestablishment and the withdrawal of recognition from that organization, is whether a situation presently exists which requires correction and calls for remedial action by the Board. The Act itself is remedial, not punitive. *Republic Steel Corp.* v. *Labor Board,* 311 U. S. 7, 10-1 (1940).

The decision of this court in *Labor Board* v. *Southern Bell Telephone & Telegraph Co.,* 319 U. S. 50 (1943), establishes that in the present case the Board has proceeded in a manner not authorized by the Act. That this Court has taken the position that the ultimate issue in a domination case is whether the labor organization in question is in fact presently dominated by the employer, is, we think, clear from the following language of the opinion (319 U. S., at p. 60):

> "A genuinely free union composed of employees of one corporation alone may satisfy the requirements of §7 but where, as here, evidence exists of original employer interference, the Board may appraise the situation and even forbid the appearance of such a

> anion on the ballot to select bargaining representatives where in the Board's judgment the evidence does not establish *the union's present freedom from employer control.*" (Italics ours.)

The basic principle that an administrative agency must review and appraise the evidence bearing on the ultimate issue presented to it, and make a specific finding on that issue, has been enunciated by this Court on other occasions, *e. g., United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 488-9 (1942), *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 195-7 (1941).

It is plain from the decision of the Board that it did not appraise the present situation to determine whether or not in fact the Union is actually dominated. The Board did not consider "the union's present freedom from employer control" as required by the *Southern Bell* case, quoted above.

There is no evidence of actual domination in the record and there is no finding of fact by the Board that the Union is presently dominated. The Board states this as a conclusion (R. 94), but it clearly appears from its decision that this conclusion is based solely on conclusions drawn from events at the time of the organization of the Union in 1937 and that in reaching such conclusion no attempt was made to appraise the present situation.

This conclusion of the Board (R. 94) starts with the phrase "Upon the basis of the foregoing facts". "The foregoing facts" set forth in the preceding statements in this portion of the decision (R. 90-94) all relate to the events of 1937. There is no finding of fact regarding the situation at the plant today.

Thus, the Board has declined to commit itself on the crucial question of present actual domination or independence of the Union. We submit that there can be no doubt but that, under the *Southern Bell* and other decisions of this Court, this is an error of law which vitiates the Board's order.

The Board did notice (R. 94-95) that the Company raised the question of present domination, but the manner in which the Board addressed itself to the point is erroneous in fact and in law. The Board in its decision implied, contrary to fact, that the Company, conceding domination of the Union, relied by way of exculpation on certain benefits secured by the Union for the employees as a result of bargaining. The Board then dismissed the whole question of present domination, the sole ultimate issue in the case, by saying, "the procurement of benefits by a labor organization is immaterial if, in fact, the employer has interfered with, dominated or supported the organization." (R. 94-95)

The record is entirely different. The Company denied domination and the record contains conclusive and undisputed evidence (of which benefits were only an incidental part) showing that in fact the Union is strong, independent and aggressive and not dominated.

This error of the Board is magnified by the circumstance that the substantial evidence of the Union's independence and militancy includes one item of a most significant and persuasive nature. This is the report of a panel of the War Labor Board to the effect that the Union is too aggressive and militant toward the Company. The panel urged the Company and the Union to work together more closely. The weight to which this evidence was entitled is well expressed by Judge Soper in his dissenting opinion (R. 342-3) as follows:

> "The clearest evidence of this fact [complete independence of the Union], which is entirely ignored in the opinion of the Board, is the report of the War Labor Board at the conclusion of a proceeding in which that Board undertook to resolve an impasse between the Company and the Association in respect to certain matters in dispute. The attitude of the Association and of the Company representing their respective sides showed such independence and militancy that the Board in its final report on April

30, 1943 criticized them both in the following language:

> " 'The two parties appear to have bargained as company and union since 1937, a very short time. With the best of intentions, the difficulties attendant upon the development of new ways of thinking and of dealing are not easily resolved in the early years of collective bargaining. Neither party is entirely sure of itself or of the other. Under wartime pressures, it is doubly hard to learn by studying the experience of others, or by devoting adequate time to one's own problems. Consequently, differences of opinion drag on and become serious obstacles to cooperation. A tendency to question the sincerity and motives of the other side creeps in. If to this is added some degree of aggressiveness on either side, continual irritation seems bound to ensue.
>
> " 'Something of this sort seems to be true in this case. The remedy appears to be to expedite in every possible way the development of one complete collective agreement, which would be sufficiently complete and accurate that it would remain in force indefinitely. This Company and this Union should be encouraged to draw closer together for the benefit of all concerned.'
>
> *"What more convincing affirmative proof of the Association's complete freedom from undue influence of the Company could be had than this finding of an impartial and responsible agency? One may well ask what standard of conduct the participants in an industry should adopt when one agency of the government condemns their relations as unduly intimate and close, while another government agency at the same time stigmatizes their attitude towards each other as so hostile as to interfere with efficient production."* (Italics ours.)

The Board also ignored other undisputed substantial evidence that the Union is not dominated by the Company

but is in fact free and independent. Such evidence and its effect is likewise summarized in the dissenting opinion (R. 341-2), viz.:

> "* * * What follows shows with equal certainty that in its administration the Association has remained the free and uncontrolled representative of the men. It is incorporated under the Maryland law with a board of representatives or directors, now consisting of thirty-nine men who in turn elect the officers. The board meets monthly and more often when necessary. The members meet at least once a year. The expenses are met entirely from the dues and property of the Association without outside aid from any source.
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> "Radical changes in personnel have occurred during the six year period since the Association was organized in June, 1937. There were then 1872 employees at the plant; at the present time 5100. In September, 1937 there were 1772 members and in May, 1943, 2896 members. There is no closed shop agreement requiring any employees to come into the Association. The Board of Governors, which originally consisted of 24, now has 39 elected members, and in 1943 only 2 of these were on the Board in 1937. None of the officers of the Association elected in June, 1937 were officers in 1943.
>
> "It seems obvious, in view of these changes, that even if there had been unlawful Company influence or domination in the establishment of the Association, it would long since have been dissipated. In any event, the undisputed facts demonstrate the complete independence of the Association. Its Board of Representatives has been active on behalf of the men. There were 140 bargaining conferences between the Company and the Association in the period 1937 to 1943. In 1939 the Association was affiliated with a national committee consisting of representatives of the unions in the Company's different plants and division[s]. This organization has bargained with the Company on matters of Company wide application in seventy conferences between 1939 and 1943.

> The record of these transactions indicates collective bargaining in the orthodox manner between active and independent parties and contains no hint that at any time the Board of Representatives has failed to represent the employees or has been coerced or interfered with in the exercise of its functions by the Company."

Like the Board, the majority of the Circuit Court of Appeals completely ignore the report of the panel of the War Labor Board and the other undisputed substantial evidence that the Union is not presently dominated but is aggressive and militant; instead the majority simply mention the contention that the Union is not dominated by the Company and then refer to alleged incidents of interference, matters dealt with in Point VI this Brief, and nowhere discuss the failure of the Board to consider and and appraise the report of the panel of the War Labor Board and the other evidence of the independence and aggressiveness of the Union. We respectfully submit that such federal administrative procedure, which calls forth such a vigorous protest by a Judge of the Circuit Court of Appeals, merits the consideration of this Court.

III. The order of the Board should not have been sustained, since the Board based its conclusion that the Company dominated the Union in its formation in 1937 principally on the ritualistic contention that, although the Company's announcement of termination of an employee representation plan and of its indifference to the employees' organizational efforts was made and concededly became a matter of common knowledge among the employees, the knowledge so acquired by the employees must be deemed insufficient since it did not come in the form of a direct notice from the Company to the individual employees.

In reaching its conclusion that the Union was dominated by the Company in its organization, the Board relied

principally on the fact that notice of the Company's announcement of termination of the plan and its indifference to the organizational efforts of its employees was not given in some "formal mechanical pattern" directly by the Company to its employees (R. 90). The Board, however, conceded that the announcement was made and that it became a matter of general information among the employees (R. 74).

We submit that the only legal requirement in such a situation is that the employees as a whole should know of the company's announcement of termination of the plan and of the company's neutrality, and that no particular "formal mechanical pattern" of notice is required. The Circuit Court of Appeals for the Seventh Circuit has so held in *Labor Board* v. *Duncan Foundry & Machine Works, Inc.*, 142 F. 2d 594, 596 (C. C. A. 7, 1944).

In that case the facts were identical with those in the present case (except that the Board did not there find that the notice became a matter of common knowledge among the employees, as it found here) and are succinctly described by the Circuit Court of Appeals for the Seventh Circuit as follows:

> "During May, 1937, Juttemeyer [Personnel Manager], at a meeting of the representatives of E. R. P. told them that the company could no longer be a party to or recognize the existing organization; that E. R. P. by virtue of the Supreme Court's decision, was 'outlawed,' and that they would have to do 'something else,' 'whatever they wanted to do'; that it was up to them to decide what they wished to do."

As to the sufficiency of this notice, that Court said (p. 596):

> "We think the Board's evidence justifies only the finding that, in the hearing here, the test [of sufficient cleavage] was fully met. True, respondent did not circularize each member of the E. R. P. with notice of cessation of support of the E. R. P. However,

> we can not, *nor can the Board, after seven years, say that it was necessary for respondent to follow any certain formal mechanical pattern of procedure* in order to evince disestablishment, inasmuch as the evidence establishes beyond peradventure an honest, active and successful effort by respondent to effectuate its detachment, and clear understanding of the attitude of the employer in this regard upon the part of the employees." (Italics ours.)

Westinghouse Elec. & Mfg. Co. v. *Labor Board,* 112 F. 2d 657 (C. C. A. 2, 1940); aff'd 312 U. S. 660, is not to the contrary. There the Board had specifically found that the company's statement had never been conveyed "to the employees generally, in any manner." (18 N. L. R. B., at p. 313) The majority of the Circuit Court of Appeals for the Second Circuit unquestionably thought, as their opinion shows, that this was the controlling circumstance in the case. Circuit Judge Swan dissented because he believed that the company's announcement to the representatives "was undoubtedly spread among the employees by those to whom it was made." (112 F. 2d, at p. 661)

The evidence in this record as to the nature of the Company's announcement and the manner of its transmission to the employees in the present case is thus summarized in the dissenting opinion of Judge Soper (R. 334):

> "A few days after April 12, 1937, when the Jones and Laughlin decision was handed down, the works manager announced at a meeting of employee representatives that the Plan was 'out'; that it was at an end; that the company could no longer bargain with them and that the employees were free to set up or join any organization that they desired.
> * * *
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> "The employee representatives passed on the notice received from the Company to their constituents. The representatives, nearly all of whom testified, were unanimous in saying that they reported

> to the men what had taken place at the meeting with the manager. Their uncontradicted evidence made it abundantly clear that the Plan was out, that they could no longer represent the men or bargain with the management, that the men would have to get a new union or form one of their own or choose any organization that they preferred, and that it was immaterial to the Company what action they might take. This information passed through the body of the employees like wild fire, but it did not come with the shock of a surprise because the men, by reason of their familiarity with labor matters were expecting it."

Judge Soper went on (R. 335) to point out that under both the *Duncan Foundry* case and the *Westinghouse* case this notice was amply sufficient to constitute a clear line of cleavage between the employee representation plan and the Union subsequently formed.

The majority say nothing inconsistent with the evidence above summarized by Judge Soper. They characterize the Company's announcement as "equivocal" and "ambiguous" (R. 331, 328), but do not point out how an announcement that the employee representation plan was "out" and that employees were free to form an organization on the outside, or to form their own union, or to join anything they wanted to, could be ambiguous or equivocal. Also as grounds of objection to the Company's announcement, the majority point (R. 326) to the non-existent Mileski-Schmidt incident (disposed of *supra,* pp. 14-5) and to the issuance of circulars, concededly "not binding on the Company" (R. 326), containing statements of reasons for the termination of the plan, which, though concededly true as far as they went, were allegedly incomplete. But the majority do not indicate how any employee statements regarding the reasons for the termination of the plan could negative the employees' knowledge of the pivotal facts that the plan had been terminated and that the Company was neutral, or

how a direct announcement from the Company to the employees could have prevented the issuance of such circulars.

The effort of the majority below to dispose of the *Duncan Foundry* decision is ineffective. The majority say that in the *Duncan Foundry* case the employees obtained a "clear understanding of the attitude of the employer", implying that they did not in the present case, notwithstanding that the Board in the *Duncan Foundry* case made no finding that the company's announcement became a matter of general knowledge but made an express finding in the present case to that effect. The quotation used by the majority is not from the Board's decision but from the Court's opinion in the *Duncan Foundry* case. That Court made that holding on a set of facts and of findings by the Board entirely similar to those in the present case, except that, as previously stated, in the *Duncan Foundry* case the Board made no finding that the company's announcement became a matter of general knowledge among the employees.

It is therefore no answer to the *Duncan Foundry* case to say, as the majority say in the case at bar, that here "the Board has found that the Company failed properly to bring home to its employees" the necessary announcement. The Board in the *Duncan Foundry* case had reached the same conclusion as to improper notice as appears from the following excerpt from its report of the case (50 N. L. R. B. 609, at p. 636):

> "Afterwards, about May 1937, the respondent informed the representatives that the E. R. P. was illegal under the Act and that something else would have to be done. No disavowal of the E. R. P. was ever made to the employees. Not only did the respondent fail to take formal action disestablishing the E. R. P. but the representatives themselves took no such formal action. It cannot be held that the word of mouth discussions which took place in the plant or the opening statement of Chairman Cannon at the meeting of June 4, 1937, constituted a dis-

> establishment of the E. R. P. or freed the minds of the respondent's employees from the pattern of domination which had clearly developed under the E. R. P."

The foregoing finding could not be sustained upon the evidence in the *Duncan Foundry* case. *A fortiori,* the conclusion of the Board in the case at bar, that the Company's announcement of termination was insufficient to constitute a "clear line of cleavage", cannot be sustained in face of the finding of the Board that (R. 74):

> "Meese's [Works Manager] statement was reported by the representatives to their constituents in the various departments of the plant *and it became a matter of general information.* In general, the representatives told the employees that the respondent would no longer recognize the Plan, and that the Plan was 'out'." (Italics ours.)

No other conclusion can be reached but that the decision of the majority of the Circuit Court of Appeals for the Fourth Circuit here is in direct conflict with that of the Circuit Court of Appeals for the Seventh Circuit in the *Duncan Foundry* case. Moreover, this question of whether a company's announcement of the termination of an employee representation plan must be made in some "formal mechanical pattern of procedure" in order that there may be a subsequent legal union is certainly a matter of great importance in the administration of the Act which should be settled by this Court.

Nor can the error of the Board and the Court in relying upon this alleged lack of sufficient notice be disregarded on the theory that there are other grounds upon which the decision of the Board might be supported. The Board has not purported to act upon several independent alternative grounds, but upon the aggregate of a "whole congeries of facts" (R. 330) of which this alleged insufficiency of notice was the pivotal element. If the Board was not, as a

matter of law, entitled to rely on the claimed lack of sufficient notice, the reviewing court is not in a position to assume what conclusion the Board would have reached if the Board had not taken that fact into consideration. (*Labor Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 478-80 [1941]; *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80, 95 [1943].)

This principle is also applicable to the other improper elements relied on by the Board discussed below in Points IV and V.

IV. The order of the Board should not have been sustained, since the Board, in concluding that the Company was dominating the Union in its formation in 1937, relied on organizational activities of the employees themselves, although there is not even a claim that the Company in any way advised or assisted or interfered with their organizational work.

The Board in its decision (R. 90-93) placed substantial reliance, in reaching its conclusion that the Union was dominated by the Company in its formation, on certain organizational actions taken by the employees themselves. These actions were (a) the election by the employees of former representatives under the employee representation plan to draft a form of labor organization to be submitted for the approval or rejection of the employees at a second election; (b) some use by the employees of a copy of the plan in drafting the constitution and by-laws of the Union so that some formal similarities were present (the Board, however, finding that the principal provisions of the plan were omitted, [R. 82-3]); (c) the insertion by the employees into the by-laws of the Union of an alleged provision requiring that a representative of a district must work in that district (although there was in fact no such by-law upon organization of the Union [R. 255-66]); and (d) the

adoption by the employees of certain election machinery for the two elections, whereby a committee was elected to submit a draft of a form of labor organization and then the labor organization thus submitted was voted on.

There is no finding or claim by the Board that the Company participated in any way or interfered with or advised in respect of these organizational activities of the employees

The Circuit Courts of Appeals for the Seventh and Fifth Circuits have held that action taken by employees themselves in the formation of a labor organization can not properly be relied on in reaching a conclusion that such labor organization was dominated by a company in its formation, when the company did not participate or advise or assist in such action of its employees.

Commonwealth Edison Co. v. *Labor Board*, 135 F. 2d 891 (C. C. A. 7, 1943);

Foote Bros. Gear & Mach. Corp. v. *Labor Board*, 114 F. 2d 611 (C. C. A. 7, 1940; remanded for decision on certified record, 311 U. S. 620; and former decision adhered to, 121 F. 2d 802);

Labor Board v. *Duncan Foundry & Machine Works, Inc.*, 142 F. 2d 594 (C. C. A. 7, 1944);

A. E. Staley Mfg. Co. v. *Labor Board*, 117 F. 2d 868 (C. C. A. 7, 1940);

Magnolia Petroleum Co. v. *Labor Board*, 112 F. 2d 545 (C. C. A. 5, 1940);

Humble Oil & Refining Co. v. *Labor Board*, 113 F. 2d 85 (C. C. A. 5, 1940).

The doctrine enunciated by these decisions would certainly seem to be sound on principle. In any event, they establish in other circuits a rule which is contrary to the rule applied in the present case by the Circuit Court of Appeals for the Fourth Circuit. This divergence of views among the circuits, on a matter which is important in the administration of the Act, calls for resolution by this Court.

V. The order of the Board should not have been sustained, since the Board, in concluding that the Union was dominated by the Company, relied on the fact of performance by the Company of its legal duty under the Act of recognizing a committee of employees elected by the overwhelming majority of its employees as the collective bargaining agent of the employees for a period of sixty days, prior to the organization of the Union, when there was no contest or organizational effort on behalf of any other labor organization.

The Board placed stress in the conclusory part of its decision (R. 91) on the recognition by the Company of a committee elected by a majority of the employees as bargaining agent for a period of sixty days for the employees at the plant prior to the organization of the Union in June 1937. No other labor organization was making any contest or in fact engaging in any organizational effort at the plant at the time, and no such effort occurred until 1943, as found by the Board (R. 86).

The Circuit Courts of Appeals for the Ninth, Eighth and Seventh Circuits have held that recognition of the agency chosen by a majority of a company's employees is the legal duty of a company, and that no conclusion of domination by the company can be drawn from such recognition, however promptly accorded, particularly where, as here, there was no other labor organization making any organizational effort whatever.

Labor Board v. *Hollywood-Maxwell Co.*, 126 F. 2d 815 (C. C. A. 9, 1942);

Cupples Co. Manufacturers v. *Labor Board*, 106 F. 2d 100 (C. C. A. 8, 1939);

Foote Bros. Gear & Mach. Corp. v. *Labor Board*, 114 F. 2d 611 (C. C. A. 7, 1940).

Here, again, on this important matter in the administration of the Act, the decision of the Circuit Court of Appeals for the Fourth Circuit herein is in conflict with the decisions in other circuits which seem sound on principle. Certainly this question, which has not been passed on by this Court, should be resolved.

VI. It was error for the Circuit Court of Appeals to approve the reliance by the Board on alleged incidents of preferential treatment of the Union or opposition to the I. A. M. by the Company.

The discussion in Point I of this brief relates, among other things, to alleged incidents upon which the Board itself did not rely in reaching its conclusion of domination and interference. We there adverted to the intolerable situation in which litigants before administrative agencies would be placed if the orders of such agencies could be sustained upon grounds on which they have not relied.

The Board did use other alleged incidents with respect to which the Trial Examiner had found that there was "no substantial credible evidence" (R. 59). The considerations advanced in Point I apply to these incidents. Neither the Act nor the regulations of the Board furnish any machinery by which the Company could protect itself against these allegations in view of the way the record developed.

Once the Trial Examiner had rejected these incidents and recommended that the charge of interference be dismissed, the Company was unable to guard itself against a reinjection of these matters by the Board. Under the rules of the Board, no matter in the Trial Examiner's intermediate report may be objected to before the Board in the absence of exceptions (NLRB Rule 33). No such exceptions were filed to the Trial Examiner's disposition of these alleged incidents. The I. A. M., the charging union, asked

that the Trial Examiner's report be adopted without change. Consequently, there was no occasion or opportunity for the Company to brief or argue them before the Board, and they were neither briefed nor argued, nor did the Board ask for any discussion of them. After the Board, by its decision, had reinjected certain of the incidents, the Company urged in the Circuit Court of Appeals that such use of the incidents by the Board was improper. Nevertheless, the majority of the Court also rely upon these alleged incidents and in addition, as already stated, add other incidents on which the Board itself did not rely

We emphasize the importance in the administration of the Act of a decision by this Court as to the propriety in administrative proceedings of the above described procedure.

Moreover, the incidents themselves, even if taken at full face value, were entitled to no consideration whatever as the basis of a finding either of domination or of interference. They involved only seven nonsupervisory employees out of over 5,000 and only six supervisory employees, all at the lowest levels, out of over 400. There was not the remotest suggestion that any policy-making official of the Company had any part in them or that any of them involved any coercion or disciplinary action.

In giving significance to any such alleged incidents, the Board, and the majority of the Circuit Court of Appeals for the Fourth Circuit, have made a decision in conflict with the following decisions of this Court and the Circuit Courts of Appeals for the Second, Third and Fifth Circuits.

Labor Board v. *Virginia Electric & Power Co.*, 314 U. S. 469, 477, 479 (1941);

Labor Board v. *American Tube Bending Co.*, 134 F. 2d 993, 995 (C. C. A. 2, 1943); cert. den. 320 U. S. 768;

Jacksonville Paper Co. v. *Labor Board*, 137 F. 2d 148, 152 (C. C. A. 5, 1943); cert. den. 320 U. S. 772;

Labor Board v. *Sun Shipbuilding & Dry Dock Co.*, 135 F. 2d 15 (C. C. A. 3, 1943);
Magnolia Petroleum Co. v. *Labor Board*, 112 F. 2d 545, 551-2 (C. C. A. 5, 1940);
Humble Oil & Refining Co. v. *Labor Board*, 113 F. 2d 85, 92 (C. C. A. 5, 1940).

See also:

Labor Board v. *Sands Mfg. Co.*, 306 U. S. 332, 342 (1939).

All of the foregoing cases establish the principle that actions and statements of minor supervisory employees are not attributable to the Company in the absence of any background indicating that the Company sponsored or approved any preferential, discriminatory or anti-union activity on the part of such minor supervisors, and that to the extent that such incidents involve expressions of views by supervisory employees, or even by the Company, they are protected by the constitutional guarantee of freedom of speech.

In contrast to the casual and uncritical manner in which the majority opinion of the Circuit Court of Appeals accepts these incidents as grounds for the Board's action, the dissenting opinion (R. 343-6) contains a careful and analytical examination of each of them and concludes, on the basis of the facts shown by the record and the applicable authorities, that the Board, as a matter of law, was not entitled to use them as the basis for any conclusion whatever.

We submit that it is an important question in the administration of the Act whether the Board may go out of its way to charge employers who operate huge and intricate industrial establishments with responsibility for the kind of uncontrollable and insignificant trivia mentioned in the Board's findings. To say that such matters "lend color to the over-all picture" or that, on the other hand, a hypothetical "over-all picture" gives significance to them

is, on this record, a mere linguistic fiction on the basis of which serious blame is imputed to an employer against whom no suspicion of anti-union activity or attitude can otherwise be directed.

Conclusion.

It is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

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February 26, 1945.

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